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In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR APPELLEE

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:

JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103

QUESTION PRESENTED

As framed by the district court in its Order, the question presented is "[w]hether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant" (J.S.APP.1a).

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BRIEF FOR APPELLEE

STATEMENT

1. Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) provides that officers of the Wage and Hour Division of United States Department of Labor may enter upon the premises of certain business establishments and conduct investigations with an eye to compliance with the act and related regulations. The compliance officer is under instructions to review compliance throughout the particular establishment to be reviewed, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation. In the instant case, the investigation sought to be conducted is unlimited in scope (J.S.App.2a.; J.A.11). The Department does not disclose the basis for the investigation (J.A.12).

On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the Department of Labor telephoned Susanne White, manager of appellee, Lone Steer, Inc., a motel-restaurant located in Steele, North Dakota and informed her that he would commence an investigation of appellee the following morning at 9:00 a.m. Also, he told Ms. White to make available to him, wage and payroll records for all employees for the last two years. Later that day, Ms. White called Mr. Godes back, stating that it was not convenient for Mr. Godes to conduct the investigation on the following morning (J.S.App.2a; J.A.12). The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had once again scheduled the investigation of Lone Steer, Inc., and that this investigation would take place one week later on January 14, 1982, at 9:00 a.m. (J.S.App.2a; J.A.12). On January 12, 1982, Lone Steer's attorney, Richard G. Peterson, sent a letter to Mr. Godes stating:

> I represent Lone Steer Cafe in Steele, North Dakota.

> Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).
>
> If, on the other hand, you propose a general administrative inspection for compliance - not prompted by specific complaint - we request to know the scope of the investigation.
>
> Until this matter is resolved, you do not have permission to conduct an investigation (J.S.App. 3a; J.A.13).

The letter from Mr. Peterson was forwarded by Mr. Godes to Mr. Loren E. Gilbert, Assistant Regional Administrator for the Wage and Hour Division, at the regional office of the Wage and Hour Division in Denver, Colorado. On January 20, 1982, Mr. Gilbert sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Mr. Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Fair Labor Standards Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be used. See *Cudahy Packing Co. v. Fleming*, 122 F. 2d 1005 (8th Cir. 1941).
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act:
>
> I have instructed Mr. Godes to initiate this

> investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation (J.S.App.3a-4a;J.A.14).

Mr. Gilbert instructed Mr. Godes to attempt the investigation in the company of Mr. Gerald Hill, Assistant Area Director, Denver, Colorado (J.S.App.3a-4a;J.A.14).

On January 28, 1982, after receipt of the letter from Mr. Gilbert, Mr. Peterson called Mr. Gilbert to once again affirm Lone Steer's position that Mr. Godes did not have permission to investigate without obtaining a warrant from an independent magistrate as required by the ruling of this Court in *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978). Thereafter Mr. Gilbert directed Mr. Godes to attempt the investigation of Lone Steer, Inc. without obtaining a warrant from an independent magistrate and, in the event of refusal, to serve Lone Steer, Inc., with an administrative subpoena duces tecum pursuant to Section 9 of the Fair Labor Standards Act (29 U.S.C. §209) as part of its enforcement scheme (J.S.App.4a; J.A.14-15).

On February 2, 1982, at approximately 10:30 a.m., Mr. Godes, accompanied by Mr. Hill, entered the premises of Lone Steer, Inc., in an attempt to conduct an investigation. They were informed that Ms. White was not available at that time and were offered some coffee while they waited in the lobby area. After twenty to thirty minutes Mr. Godes properly served an administrative subpoena duces tecum on Karen Arnold, an employee of Lone Steer, Inc. (J.S.App.4a; J.A.15).

The administrative subpoena duces tecum had

been issued in Washington D.C. on January 28, 1982, over the signature of William Otter, Administrator of the Wage and Hour Division of the U.S. Department of Labor (J.S.App.5a; J.A.16). On February 8, 1982, Mr. Peterson called Henry Mahlman, counsel for the U.S. Department of Labor in Denver, Colorado, to reiterate Lone Steer, Inc.'s position that a warrant from an independent magistrate was required for the inspection (J.S.App.5a; J.A.16-17). Mr. Peterson confirmed Lone Steer, Inc.'s position in a letter to Mr. Mahlman on February 10, 1982 (J.S.App.5a; J.A. 16-17).

2. Lone Steer, Inc., initiated an action against the appellants, in the United States District Court for the District of North Dakota alleging that the appellants' investigation pursuant to Section 11 and Section 9 of the Fair Labor Standards Act (29 U.S.C.§209,§211) constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution (J.A.21). The relief sought by Lone Steer, Inc., included a preliminary injunction and permanent injunction enjoining appellants from entering Lone Steer, Inc.'s premises or seizing any of Lone Steer Inc.'s property with an administrative subpoena, without obtaining a warrant or its equivalent from an independent magistrate. Lone Steer, Inc., also requested that a Declaratory Judgment be granted declaring that the Fair Labor Standards Act (29 U.S.C. §201 et seq) is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative subpoena after entry to inspect has been denied (J.A.22). The Secretary of Labor initiated an action in the same court to enforce the administrative subpoena. The district court consolidated the actions and issued its order on October 27, 1982 (J.S.App.1a-8a).

After noting that all operative facts had been stipulated, the court identified the central issue as

whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer, Inc.'s records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant (J.S.App.1a). The district court resolved the issue by granting summary judgment in favor of the Appellee and denying summary judgment to the Appellants (J.S.App.8a).

In its order, the district court noted that the repeated attempts by the agents of the Secretary to inspect, review and transcribe the records - as well as the use of an administrative subpoena after permission to enter was repeatedly denied-"unquestionably comport with the provisions of the Fair Labor Standards Act. . ." and with the implementing regulations (J.S.App.6a). The court further noted that the refusal to comply with the administrative subpoena is an offense punishable by fine or imprisonment or both (J.S.App.6a). The district court relied upon *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978) in holding that the statutory scheme relied upon by the appellants is constitutionally impermissible in that there is no provision for having obtained a valid warrant prior to the attempted inspection (J.S.App.6a-8a). This Court in *Barlow's* held that the Fourth Amendment prohibits nonconsentual inspection of businesses, although probable cause in the criminal law sense is not required (J.S.App.7a). In rejecting the Secretary's argument, the district court noted that:

> "The reasoning of the Supreme Court in *Barlow's* applies with equal - if not greater - force in the instant situation" (J.S.App.8a).

After the order of the district court has been issued, the appellants filed a motion to alter or amend the judgment allowing the use of the administrative subpoena to take the records outside of the establishment which, in effect, disregarded the re-

peated attempts at entry upon the premises and attempted to change the issue which had been resolved in the district court (J.S.App.15a-17a). The court denied the motion (J.S.App.13a-14a).

SUMMARY OF ARGUMENT

It is beyond dispute that the inspection of documents on the premises of Lone Steer, Inc., under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without first having obtained a warrant is unconstitutional under the Fourth Amendment to the United States Constitution. The appellants' motion to alter or amend the judgment ignored the repeated attempts at entry. The motion only concerned an enforcement mechanism to be used when permission to enter the premises has not been granted. The appellant seeks to retain the right to use the statutory authority, which was, in effect, declared unconstitutional by the district court, as a basis for its authority to gain permission for entry.

This Court in *Marshall v Barlow's, Inc.* 436 U.S. 307 (1978) analyzed the entire statutory investigative scheme, including the enforcement mechanism, to determine constitutionality. The enforcement mechanism must be the functional equivalent of a warrant in order to be constitutional. The administrative subpoena, which is issued automatically by the Department of Labor to itself whenever permission to enter is refused, cannot be viewed as the functional equivalent of a warrant. There is no review by any independent magistrate. Not even the minimal level of probable cause, cited by the appellants in their brief, is required in order to obtain the administrative subpoena.

The appellant attempts to further dismember the facts of the case by centering on the fact that the administrative subpoena is directed to documents. In support of this contention it relies upon a series of cases

which were all decided long before this Court rendered its decision in *Barlow's*. Appellant contends that its cases, which were decided decades ago, were entirely unaffected by *Barlow's*. Additionally, appellant ignores the fact that this Court included documents within the scope of its holding in *Barlow's*. The use of the administrative subpoena was simply a last resort in a unified investigatory scheme to enter the premises of Lone Steer, Inc., in order to conduct its investigation.

ARGUMENT

IT IS BEYOND DISPUTE THAT THE WARRANT CLAUSE APPLIES TO THE UNRESTRICTED ENTRY AND INSPECTION PROVISIONS OF SECTION 11 OF THE FAIR LABOR STANDARDS ACT; THE INJUNCTION - FORBIDDING ENTRY AND INSPECTION - AND THE DECLARATORY JUDGMENT WERE PROPERLY GRANTED BY THE DISTRICT COURT.

Contrary to the Brief for the appellants, the judgment in the instant case resulted from repeated, persistent attempts by the appellants to gain entry, after permission to enter was specifically denied — not merely once, but twice. The stipulation shows that on January 12, 1982, Lone Steer, Inc.'s attorney informed the appellant that they did *not* have permission to enter the restaurant to inspect payroll records, in the absence of background information regarding the scope of the investigation (J.A.13).

On January 20, 1982, the Labor Department replied that it would enter the restaurant to inspect the records, that it would not supply the information, and that the restaurant would have to "prohibit" the inspection. In other words, Lone Steer, Inc., would have to bar entry. (J.A.14). In a telephone conference on January 28, 1982, Lone Steer Inc.'s attorney reiterated to the Department that permission to enter and inspect was denied (J.A.14-15).

Nevertheless, in an ostentatious display of authority, the compliance officer and a high ranking department official flown in from Denver, Colorado, entered the restaurant to attempt the inspection (J.A.15).

After the district court held that the Department's Section 11 authority to inspect employer records was subject to the Warrant Clause, it was astounding to see the Department's motion to alter or amend the judgment as follows:

The Secretary moves to alter or amend the judgment as follows (Proposed alterations or amendments are underlined):

> "This action came on for hearing before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,
>
> It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.
>
> *It is further Ordered and Adjudged that the Administrative Subpoena Duces Tecum, which requires the production, for inspection and copying by the Secretary of Labor, of records Lone Steer is required to maintain, at a location away from Lone Steer's premises, should be enforced. Lone Steer is directed to comply with the terms of said subpoena by producing*

such records at the place therein provided, on _____, 1982 at _____ o'clock _____m." (J.S. App.15a-17a).

The district court made clear in the judgment that the statutory scheme of the Fair Labor Standards Act, providing for entry and inspection of documents under Section 11, is subject to the Warrant Clause of the Fourth Amendment pursuant to the holding of *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978). The appellants appealed from the district court's denial of its motion to add enforcement of the subpoena as a constitutionally permissible enforcement device.

THE ADMINISTRATIVE SUBPOENA DUCES TECUM, AN ENFORCEMENT DEVICE OF SECTION 11 OF THE FAIR LABOR STANDARDS ACT – WHICH IS CLEARLY SUBJECT TO THE WARRANT CLAUSE – IS NOT THE FUNCTIONAL EQUIVALENT OF A WARRANT.

The Brief for the appellants separates the enforcement device, the subpoena, from the authority to inspect under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211). Indeed, without the inspection authority under Section 11, the appellants could not use the subpoena powers of the Federal Trade Commission Act through Section 9 of the Fair Labor Standards Act (29 U.S.C. §209).

This Court in *Barlow's* emphasized that the statutory investment scheme – inspection through enforcement – is examined to determine constitutionality. In *Barlow's*, as in the instant case, the statute authorized warrantless entry and inspection. The only difference is between the enforcement mechanisms. The administrative subpoena is an enforcement mechanism in the instant case. As this Court outlined in Barlow's, where the inspection provisions—such as Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) are subject to the Warrant Clause of the Fourth

Amendment, the enforcement mechanism may be examined to determine if it is "the functional equivalent of a warrant." 436 U.S. 307, 324, n.23. The administrative subpoena, a broad discovery device issued by the Department itself and enforced in Court without regard to any minimal level of "probable cause' can hardly be viewed as the functional equivalent of a warrant.

It is clear that Section 11 of the Fair Labor Standards Act (29 U.S.C. §211), which authorized warrantless entry into businesses for the purpose of inspecting records, is squarely within the holding of *Barlow's*. Section 9 of the Fair Labor Standards Act (29 U.S.C. §209) purports to augment the Secretary's Section 11 investigation authority providing him with subpoena power in aid of those investigations. Therefore, the concerns expressed by this Court in *Barlow's* apply to the entire investigatory scheme of this the Fair Labor Standards Act, including the compelled production of records under Section 9 of the Fair Labor Standards Act (29 U.S.C. §209).

The official inspection procedure used by the appellants reveal that the use of the administrative subpoena is inextricably intertwined with the entry process. The Wage and Hour Division's Field Operations Handbook §86b00 provides that compliance officers who encounter employer resistance to an inspection are to "explain" the provisions of Section 9 and 11 of the Fair Labor Standards Act (29 U.S.C. §209, §211) to the employer. If the employer persists in refusing an entry inspection, the compliance officer is instructed to report the matter to his or her supervisor, who will attempt to persuade the employer to allow the inspection. If a letter is sent to the employer, it "shall indicate the scope of the Division's investigatory powers as set out in FLSA Secs. 9 and 11(a), and shall request the employer to reconsider the refusal."

It is appellants' established policy to seek entry inspections by expressly relying on its inspection authority under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211). It is only after repeated attempts by the compliance officer and Area Director to schedule an entry inspection have failed, that the Division considers issuing an administrative subpoena. Handbook §86b00(d).

This procedure was followed in the present case. After the compliance officer demanded an entry inspection and encountered resistance, the appellant made several attempts to persuade Lone Steer, Inc.'s attorney "explaining" the scope of the appellant's investigatory powers. It was only after these attempts had failed that a subpoena was issued. In fact, the subpoena was not served until Lone Steer, Inc., filed its injunction action, and even at this point, the compliance officer was instructed to repeat his attempt to obtain entry before serving the subpoena.

The fact that documents are the object of the inspection does not limit the scope of the Constitutional protection. In *Barlow's* this Court specifically included documents in its holding (436 U.S. 324, n.22).

This Court in *Barlow's* was primarily concerned with the method used by an administrative agency to select the targets of its investigation. It was the unbridled and unreviewed discretion of the field officer that the court found especially objectionable in his regard. It is clear from the facts as stipulated in this case and the provisions of the Fair Labor Standards Act (29 U.S.C. Section 201 et.seq.) that the field officer is given just such unbridled discretion in selecting the targets of his investigation.

If the district courts are permitted to enforce administrative subpoenas issued in aid of an investigation pursuant to Section 11 of the Fair Labor Standards Act (29 U.S.C. §211), the Fourth Amendment concerns expressed by this court in *Barlow's* will

be bypassed by the unlimited use of administrative subpoenas. Additionally, the appellant will still be able to obtain permission for entry prior to having to resort to an administrative subpoena by claiming authority under the provisions which were held unconstitutional by the district court in this case. The resort to the use of an administrative subpoena as part of a unified investigatory scheme is simply an attempt to enter the same location through a back door.

In *Barlow's*, the Secretary of Labor contended, as he contends in the instant case, that documents may be inspected without a warrant. Just as this Court rejected the Secretary of Labor's contention in *Barlow's*, it should reject the contention again.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully Submitted,

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:
JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates

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